CHESAPEAKE & O. RY. CO. *v.* PARKER'S ADM'R.

June 11, 1914.

[82 S. E. 183.]

1. Appeal and Error (§ 870*)—Review—Matters Reviewable—'First Trial."—Under Code 1904, § 3484, providing when a case at law is tried by a jury, and the successful party excepts to the granting of a new trial for insufficiency of the evidence, and the evidence is certified, the appellate court, if there have been two trials below, shall first look to the evidence and proceedings on the first trial, and, if the setting aside of the first verdict was error, all proceedings subsequent thereto shall be annulled, and judgment rendered thereon, the "first trial" means the first at which exceptions to the granting of a new trial were taken, and hence the statute applies and warrants review of the granting a new trial for the third time where no exceptions had before been taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3457-3489, 3491-3512; Dec. Dig. § 870.*]

2. New Trial (§ 35*)—Ground of New Trial.—In an action for wrongful death, the erroneous admission of a statement by the deceased shortly after the accident, which was purely a self-serving declaration, warrants the granting of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

3. Master and Servant (§ 278*)—Injuries to Servant—Sufficiency.—In an action for the wrongful death of a servant, while painting cars for a railroad company, evidence held sufficient to warrant a finding that the company was negligent in failing to protect the car by flags according to the rules, and that because of that negligence other cars were shunted against the one on which decedent was working, thus causing his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

4. Master and Servant (§ 265*)—Injuries to Servant—Contributory Negligence.—The defense of contributory negligence is an affirmative defense, and a master seeking to defeat recovery on that ground has the burden of proving it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

5. Master and Servant (§ 289*)—Injuries to Servant—Questions for Jury—Demurrer to Evidence.—In an action for the wrongful death of a servant, where the master set up contributory negligence

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

and demurred to the evidence, the court properly found for plaintiff, where the evidence was such that the jury as reasonable men might have found that the servant was free from contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

6. **Master and Servant (§ 281*)—Injuries to Servant—Actions—Contributory Negligence.**—In an action for the wrongful death of a car painter killed when other cars were shunted into the one on which he was working, evidence held sufficient to warrant a finding that he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

7. **Master and Servant (§ 240*)—Injuries to Servant—Contributory Negligence.**—Where the rules of a railroad company required cars upon which work was being done to be protected by blue flags and warnings given when they were to be moved, a painter working on a car was not guilty of contributory negligence, where, relying on the master's performance of its duty, he stood on the rail between the cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

8. **Master and Servant (§ 226*)—Assumption of Risk—What Constitutes.**—A servant does not assume the risk of injury from the negligence of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Error to Circuit Court, Henrico County.

Action by Robert L. Parker's administrator against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error, and plaintiff assigns cross-errors. Affirmed.

D. H. & Walter Leake, of Richmond, for plaintiff in error.
Hunsdon Cary, of Memphis, Tenn., and *E. P. Cox,* of Richmond, for defendant in error.

WHITTLE, J. This action was brought by the defendant in error, Robert L. Parker's administrator, to recover damages from the plaintiff in error, the Chesapeake & Ohio Railway Company, for the death of his intestate, which is ascribed to the defendant's negligence. Upon a demurrer to the evidence, the jury assessed the plaintiff's damages at $4,000, for which

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sum the court rendered judgment, and the case is before us upon a writ of error to that judgment.

There were four trials of the case. At the first trial there was a hung jury. At the second trial the jury returned a verdict for the plaintiff for $3,500, which the court on motion of the defendant set aside as contrary to the law and the evidence; no exception being taken by the plaintiff. The third trial resulted in a verdict for the plaintiff for $7,000, which was likewise set aside by the trial court on the ground that it was contrary to the law and the evidence, to which ruling of the court on the third trial the plaintiff excepted, and its action is made the ground of cross-error.

[1] It is insisted by the plaintiff in error that this cross-error cannot be considered because the alleged grounds of error do not apply to the first trial as prescribed by statute.

The statute in part reads:

"* * * Except that when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." Code 1904, § 3484.

The foregoing contention demands a too literal construction of a remedial statute. The third trial in this instance was the "first trial" in the sense that it was the first trial in which the ruling of the court was made the ground of exception. The statute which requires us to look to the proceedings in the first trial of necessity refers to the first trial within the cognizance of the appellate court; otherwise, we would be called on to review a case which in its nature is not reviewable, or, stated differently, to do an impossibility.

[2] The court's action in setting aside the second verdict was rested upon the admission of a statement made by Robert L. Parker to the ambulance surgeon shortly after the accident happened. In that connection it is only necessary to remark that the statement in question was not a part of the res gestæ, nor was it admissible as constituting part of an admission made by Parker to other witnesses, at a different time and on another occasion. Adams' Adm'r *v.* Eames, 107 Mass. 275. In short, the statement was a self-serving declaration pure and simple dissociated from any other assertion or admission withdrawing it from the influence of the general principle that such declarations are admissible in evidence. There was no error therefore in the court's ruling in setting aside the verdict and granting a new trial

[3] This brings us to the consideration of the court's action on the fourth trial in overruling the defendant's demurrer to the evidence and entering judgment for the plaintiff for $4,000, the damages provisionally assessed by the jury. The evidence upon this phase of the case is so satisfactorily discussed by his honor, Judge R. Carter Scott, as to warrant the adoption of his opinion on that branch of the case as the opinion of this court.

The learned judge, after announcing the rule applicable to a demurrer to the evidence, says:

"Considering the evidence in the light of the rule just cited, it appears that R. L. Parker, about 17 years of age, was employed by the Chesapeake & Ohio Railway Company as an apprentice painter, and at the time of the accident had been working for the defendant company for about 17 months under one S. Boston, the boss painter, and that on the morning of the accident, directed by Boston, he went out on the yard of the defendant company to paint out the signs on the side of the cars, 'Tidewater Only.' The signs were placed about the middle of the car and near the top thereof, between 10 and 11 feet from the ground. He was given a ladder, a paint bucket, and brush and had painted out the sign on the south side of the car, and when last seen by Boston, just prior to the accident, was on the north side of the track with his ladder up against the car and standing in the aisle by the ladder. Boston places him in this position, and testifies that he turned to go to the east end of the yard, directing Parker to follow him when he had performed this work, that is, had painted out 'Tidewater Only' from the north side of the car, and that he (Boston) had not walked more than a car's length or a little more when he heard the impact and Parker's cry. The evidence further shows that there were about seven or eight cars on the track on which Parker was working, two to the west of the car on which he was working and five to the east, and that the shifting force of the Chesapeake & Ohio kicked from the east on the track on which the car was, on which Parker had been painting, several cars; that there was no blue flag up to indicate that any one was working under or about said car; that the shifting crew were ignorant that any one was working on the said car, no information being given that cars would be kicked on said track, nor was he informed that it was dangerous to go in or about the car on which he was working. It further appears that, upon the cars being kicked and the cry being heard, Boston and other employees of the railway company rushed into the aisle between the tracks and found Parker lying on the ground with his foot and leg mashed; that he was taken up, put on an

engine, carried to a house in the yard, and the ambulance called for. The doctor arriving examined him and sent him to the Wm. Byrd Hospital, where a further examination of him was made and a report made to the company. Parker died from the effects of his injuries. The plaintiff in this case alleges that the railway company was guilty of negligence in that they put R. L. Parker to work upon a car without giving him warning, as provided by rule 26, or in any other way, that the car might, at any time, be moved by the shifting crew of the yard. It is replied that the work that he was doing was on the side of the car, in between the aisle, would take only a few minutes to do, that it was not of a dangerous character, and that it was the custom of the C. & O. Ry. Co. as well as a general custom of all roads in doing this character of work, never to put up blue flags or to give any notice that this character of work was being done. But on the demurrer to the evidence it must be taken as true that such is not the custom of railroads in this character of work. (See depositions of H. C. Sparks and testimony of Joseph W. Smith.) Upon the evidence, had the case been submitted to the jury, properly instructed, it would have been sufficient to warrant a finding by them that the defendant was guilty of the negligence charged in the declaration with respect to the want of due care in requiring flags to be put up for the protection of their employee and the enforcement of such rules and regulations, and inasmuch as this record shows that there was no instruction given by the defendant company to Parker that it was dangerous to go between the cars, under the well-established rule cited above, and which governs the consideration of this case upon the demurrer to the evidence, this court must so hold.

[4-6] "The defendant in this case relies upon R. L. Parker's contributory negligence. This is an affirmative defense, and the burden of maintaining it is upon the defendant, and the question for the court to determine is upon a careful consideration of the evidence whether or not, had the case been fairly submitted to a jury, under proper instructions, they would have been warranted in finding from the evidence that R. L. Parker was free from such negligence as would have barred his right to recover in this case.

"The rule as stated above is that, when the consideration of the evidence is taken from the jury by the demurrer, if the jury could have found therefrom that the demurree was free from such negligence contributing proximately to the cause of his injury, the court must so find. Now what is the evidence as to Parker's contributory negligence? The report says: 'Full particulars of the cause of injury as given by the patient: Was getting a bucket full of paint from between the cars when an-

other car was shoved up against it and knocked me down running over my foot.' The defendant company draws the inference and strongly argues that if he went between the cars, and the court must take this fact as proven (which is by no means certain), then it cannot be said that he was not guilty of contributory negligence, and the jury would not be justified in drawing any other conclusion than that he was guilty of contributory negligence, and therefore the court on the demurrer to the evidence should so hold. But what are the facts proved in this case? That a boy, 17 years old, was given a ladder, directed to go up on the side of cars on this ladder and to paint out 'Tidewater Only' from the sides of the cars. The record is silent as to what knowledge he had that the car would be moved. It is true he had been with the company 17 months, but there is nothing to show that any car had been bumped into whilst he was doing any work thereon. The evidence in this case further shows that on the morning of the accident he had gone up and painted out 'Tidewater Only' from the south side of the car, and the jury would have the right to presume from the evidence when he went to that car in the morning to do the painting, that he put his bucket on the bumper as soon as he reached the car, and that having performed the work on the south side of the car, with his ladder he passed around the end of the two cars on the west of the track, passing over the track and to the north side of the cars; that after placing his ladder against the car he then went to the end of the car on the bumper of which the paint bucket stood and reached for it, and while in the act of reaching for the bucket the impact came, he was knocked down, and the injuries received from which he died. Under the facts as proved in this case, would not the jury have a right to say that an ordinarily prudent man would have acted in like manner under the circumstances, and is this not a matter especially for the jury and not for the court to determine as a matter of law?

"I have heretofore considered 'The report of accident,' as relied upon by the defendant as showing contributory negligence, as an absolutely true and uncontradicted account of how the injury occurred, and have the conclusion that the jury would have been justified in saying that under the evidence the deceased was not guilty of contributory negligence; but is the court justified in saying that this report must be taken as an absolutely true account?

"The report was made out by an interne, Crowgey by name, in the Wm. Byrd Hospital, who signed Dr. Henson's name to the report, 'Per C.' It appears from the evidence of Dr. Henson that he and the interne did not agree in many particulars in the evidence given in this case. Crowgey testifies that when

young Parker was brought to the hospital he was suffering a great deal from his injuries; that at the time he gave him the 'full particulars of the cause of injury' he was 'wavy' in his mind, and at times during the questioning was not rational. Under such circumstances, is the court, or would the jury be, justified in saying that this report was true and showed the manner in which the injury occurred? It appears from the uncontradicted evidence of the doctors, an examination of the shoe, and the physical facts, that young Parker could not have been standing on the track, else his foot would have been cut off. Considering carefully all the evidence in the case, can the court say that the jury would not have been justified in finding that the report was not accurate, but that Parker was on the ladder, in the line of his duty, painting out the words 'Tidewater Only' from the north side of the car when the impact occurred, and that he was thrown therefrom and, without fault on his part, injured. It seems to the court that the jury could have so found had the case been submitted to them under proper instructions.

"Therefore I am of opinion that it is a matter for the jury to determine and that they had a right, under the facts and circumstances of this case, to draw the conclusion that Parker acted as an ordinary prudent man would under the same circumstances and was not guilty of contributory negligence. Atlantic Coast Line R. Co. *v.* Grubbs, 113 Va. 214, 74 S. E. 144. The court is further of the opinion that from the evidence in this case the jury had a right to draw the conclusion that the injury to the plaintiff's intestate was not one of the risks assumed in his employment, and the court must so hold. From the facts of this case, as considered upon this demurrer to the evidence, the court is of opinion that the demurrer must be overruled and a judgment entered in accordance with the verdict of the jury."

[*7, 8*] If under the evidence, as the circuit court has correctly found, Parker was entitled to the protection of rule 26, that finding eliminates all of the grounds assigned by the defendant in its demurrer to the evidence. (a) It shows primary negligence on the part of the company in suffering Parker to work on the shifting track without protecting the cut of cars upon which he was ordered to work with blue flags. (b) He had a right to rely upon that protection, and therefore was not guilty of contributory negligence even upon the defendant's theory of the accident. And (c) the negligence of the employer is not a risk incident to the employment which the employee assumes.

The judgment complained of is without error and is affirmed.

Affirmed.